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In the Supreme Court of the United States

OCTOBER TERM, 1987

JOSEPH SODOWSKI, PETITIONER

v.

NATIONAL FLOOD INSURANCE PROGRAM OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
JOHN R. BOLTON
Assistant Attorney General
FREDDI LIPSTEIN
LOWELL V. STURGILL, JR.
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

10 pp

QUESTION PRESENTED

Whether structural damage to a dwelling caused by soil settlement was excluded from coverage under the "earth movement" exclusion in a Standard Flood Insurance Policy issued pursuant to the National Flood Insurance Program.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 834 F.2d 653. The opinion of the district court (Pet. App. A18-A32) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 1987. The petition for a writ of certiorari was filed on February 23, 1988. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

In December 1982, the Illinois River overflowed its banks, inundating the petitioner's dwelling with water. As a result of the flood, the soil beneath petitioner's house underwent a change in consistency and settled, causing structural damage to the dwelling.

At the time of the flood, petitioner's property was insured under a Standard Flood Insurance (SFI) policy issued pursuant to the National Flood Insurance Program administered by the Federal Emergency Management Agency (FEMA). That policy insured the property against direct loss by flood. It defined "flood" as follows (Pet. App. A2-A3):

> A. A general and temporary condition of partial or complete inundation of normally dry land areas from:
>
> 1. The overflow of inland or tidal waters.
> 2. The unusual and rapid accumulation or runoff of surface waters from any source.
> 3. Mudslide (*i.e.*, mudflow), a river or flow of liquid mud proximately caused by flooding as defined in subparagraph A-2 above or by the accumulation of water under the ground.
>
> B. The collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water exceeding the anticipated cyclical levels.

The policy also provided that the insurer was not liable for loss "by theft or by fire, windstorm, explosion, earthquake, landslide or any other earth movement except such mud slide or erosion as is covered under the peril of flood" (*id.* at A22 (emphasis omitted)).

Petitioner filed proof of loss claims under his policy seeking recovery for structural damage to his dwelling and for damage to the contents thereof. FEMA paid the claim for the damaged contents, but denied coverage for the structural damage, taking the position that it fell within the policy's "earth movement" exclusion (Pet. App. A23).

Petitioner filed suit against FEMA, seeking recovery on his structural damage claim, in the United States District Court for the Central District of Illinois (Pet. App. A18). After a bench trial, the district court held that "[t]he settlement which caused the damage to the house is a type of earth movement which is excluded from the coverage of the insurance policy" (Pet. App. A26). The district court explained that "[a]lthough the December, 1982 flood was a cause of the damage claimed by [petitioner], the immediate or proximate cause of the damage was the settlement of the structure because of changes in the soil consistency" (*id.* at A24-A25).

On appeal, the United States Court of Appeals for the Seventh Circuit affirmed. Noting that the policy language at issue "is unambiguous in its recitation that only losses caused by mudslides or erosion" are exempted from the earth movement exception (Pet. App. A6), the court of appeals concluded that "[petitioner] is not entitled to recover for the structural damage caused by soil settlement regardless of the cause of the soil settlement itself" (*id.* at A7).

ARGUMENT

The decision of the court of appeals is correct and presents no issue meriting review by this Court.

1. This case centers on the proper interpretation of the "earth movement" exclusion in petitioner's SFI policy. The policy provided that "[t]he Insurer shall not be liable for loss: by * * * earthquake, landslide or any other earth movement except such mudslide or erosion as is covered under the peril of flood" (Pet. App. A3).[1] Petitioner

[1] Currently, SFI policies exclude "[l]osses caused by * * * land sinkage, land subsidence, landslide, gradual erosion, or any other earth movement" except such movements covered under the definition of flood. 44 C.F.R. Pt. 61, App. A(1) (Art. III A(1)).

argues that, despite this exclusion, a loss proximately caused by a "flood" as that term is defined under the SFI policy's general coverage provision is compensable, even if it also is caused more immediately by "earth movement."

a. This argument is completely at odds with the language of the policy. By its terms, the policy expressly excepts only two forms of flood-caused earth movement—mudslides and erosion—from the "earth movement" exclusion.[2] Since the policy does not contain a similar exception for flood-caused soil settlement, the only reasonable conclusion is that no such exception exists.[3] Indeed, petitioner's argument would render the "earth movement" exclusion's exception of mudslides and erosion superfluous. Since the policy defined mudslides and erosion as types of a "flood," there would be no need to exempt them from the exclusion under petitioner's theory because they would be compensable no matter what the exclusion might provide.

Accepting petitioner's theory that the SFI policy covers all losses proximately caused by flood would severely undermine the exclusion. The exclusion applies not only to earth movement, but also to fire, explosion, and landslides, among other catastrophes (Pet. App. A22). It is not

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[2] Mudslides and erosion fall within the definition of flood found in Sections (A)(1) and (B) of the SFI policy, respectively. There is no claim that the structural damage to petitioner's house was caused by either of these forms of earth movement.

[3] This reading of the SFI policy is confirmed by FEMA. The agency has proposed to amend the policy to add to the express exclusions of coverage "destabilization or movement of land resulting from the accumulation of water in subsurface land areas" (52 Fed. Reg. 42117, 42122 (1987)), explaining that "damage caused by the destabilization of land resulting from the accumulation of water in subsurface land areas * * * was never intended [to be covered by the SFI policy]" (*id.* at 42120-42121).

unusual that floods can lead to each of those additional forms of disaster, such as, for example, when a flood causes an electrical short that in turn causes a fire. Thus, petitioner's theory would greatly increase the scope and coverage of the SFI policy, predictably leading to increases in policy premiums.

Such increases in coverage and premiums would be inconsistent with the statutory scheme of the National Flood Insurance Act of 1968, 42 U.S.C. (& Supp. III) 4101 *et seq.* That Act contemplates "a program [to be] initiated and carried out gradually, [which] can be expanded as knowledge is gained and experience is appraised, thus eventually making flood insurance coverage available on reasonable terms and conditions to persons who have need for such protection." 42 U.S.C. 4001(a)(4). The Act accordingly provides for a careful balancing by the Director of the FEMA of the scope of the coverage provided against the size of the premium required to provide that coverage, so as to assure that essential coverage is available at reasonable rates. See, *e.g.*, 42 U.S.C. 4012 (Director responsible for establishing scope of program reflecting statutory priorities); 42 U.S.C. 4013 (Director to issue regulations establishing "general terms and conditions of insurability"); 42 U.S.C. 4015 (Director to prescribe chargeable premium rates based, so far as practicable, on risks involved). Judicial expansion of the coverage provided by the SFI policy trenches on these statutory responsibilities of the Director.

b. Significantly, petitioner does not rely on the language of the SFI policy. Instead, petitioner argues that the general law of insurance requires that all policies be interpreted in favor of coverage if the forces causing the loss are set in motion by an activity (here, a flood) that is covered in the policy, regardless of what any exclusion clause in the policy might provide.

Petitioner, however, ignores what is perhaps the most fundamental principle of insurance law: that an insurance policy is a contract and that where the policy language is clear, the court must enforce it as written. See 2 *Couch on Insurance 2d* § 15:4, at 122-123 (M. Rhodes rev. ed. 1984). This principle is as applicable to the interpretation of exclusion clauses as it is to the interpretation of other provisions in an insurance contract. § 15:48, at 278-282.

Since the language of the SFI policy in general, and of the "earth movement" exclusion in particular, makes clear that soil settlement caused by a flood is excluded from coverage under the policy, general principles of insurance law support the holdings below.

2. Petitioner asserts (Pet. 7-11) that the instant case conflicts with *Quesada* v. *Director, Federal Emergency Agency*, 753 F.2d 1011 (11th Cir. 1985). See also *West* v. *Harris*, 573 F.2d 873 (5th Cir. 1978) (applying "earth movement" exclusion), cert. denied, 440 U.S. 946 (1979). But even if, as petitioner suggests (Pet. 11), "the case at bar is extremely similar factually to *Quesada* and very dissimilar factually to *West*," the differing results reached by the courts of appeals reflect the highly fact-specific nature of the question presented. For example, in *Quesada* the court distinguished *West* by noting that the houses involved in *West* "were built on reclaimed swampland, which was supported by a soil which expanded and contracted with normal changes in the soil moisture * * * [so that] damage to these houses would probably have occurred regardless of any flood" (753 F.2d at 1013). Thus, although the rationale of *Quesada* is somewhat different from that of *West* and this case, this difference in rationale does not present the kind of inter-circuit conflict that requires resolution by this Court. Moreover, since the Eleventh Circuit accepts as binding precedent all decisions

of the former Fifth Circuit issued—as was *West*—before October 1, 1981 (*Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981)), this difference in rationale suggests that *Quesada*, which was issued over a vigorous dissent, might not be followed in subsequent decisions in the Eleventh Circuit.

In any event, both *Quesada* and the instant case involve interpretations of policy language that is no longer utilized (see note 1, *supra*), and the agency proposes to amend that language further to avoid the result reached in *Quesada*.[4] The asserted conflict in the circuits is accordingly of no continuing importance. Cf. *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 227 n.2 (1975) (an "issue [that] concerns only a particular order as applied to a discrete set of facts * * * [does] not merit this Court's grant of a petition for certiorari").

CONCLUSION

The petition for a writ of certiorari should be denied. Respectfully submitted.

CHARLES FRIED
Solicitor General
JOHN R. BOLTON
Assistant Attorney General
FREDDI LIPSTEIN
LOWELL V. STURGILL, JR.
Attorneys

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[4] See note 3, *supra*. The proposed change in language is designed to disapprove the result reached in *Wagner* v. *Director, FEMA*, 658 F. Supp. 1530 (C.D. Cal. 1987), appeal pending, No. 87-6108 (9th Cir.), which "adopts the reasoning of *Quesada*" (658 F. Supp. at 1537). See 52 Fed. Reg. 42117, 42120-42121 (1987).

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